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Office of Administrative Law Judges
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Issue Date: 30 May 2003

CASE NO.: 2003-LHC-0115

OWCP NO.: 01-156000

In the Matter Of:

WAYNE C. CANWELL
Claimant

v.

BATH IRON WORKS CORPORATION
Employer/Self-Insured

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a claim for worker's compensation benefits filed by Wayne T. Canwell ("the Claimant") against his employer, Bath Iron Works Corporation ("Employer" or "BIW"), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. ("the Act"). After an informal conference before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges for a formal hearing. That hearing was conducted before me in Portland, Maine, on April 16, 2003, at which time all parties were given the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer, in its self-insured capacity. Additional appearances were entered on behalf of Employer and Birmingham Fire Insurance Company, its insurance carrier for a period of time involved in this claim, and by Employer and Liberty Mutual Insurance Company, its insurance carrier during another period of time involved in this matter. [1] The Claimant testified at the hearing, and documentary evidence was admitted without objection as: Claimant's Exhibits CX 1-8; Employer's (BIW Self-Insured) Exhibits EX 1-17; Employer and Birmingham Fire Insurance Company's Exhibits BFEX 1-13; and a stipulation sheet executed by counsel for all parties and received into evidence as Joint Exhibit JX-1. The official documents in the file were received into evidence as Administrative Law Judge Exhibits ALJX 1-13. Post hearing

[1] The claim against another carrier, Commercial Union/OneBeacon Insurance Company was dismissed by order issued April 18, 2003.

briefs were authorized and were received May 23, 2003, from Liberty Mutual, Claimant and BIW Self-insured.

ISSUES

The parties have stipulated to the following:

1. The Act applies to this claim.

2. The injury occurred on 3/29/2002

3. The injury occurred at Bath Iron Works.

4. The injury arose out of and in the course of the Claimant's employment with BIW.

5. There was an Employer/Employee relationship at the time of the injury.

6. The Employer was timely notified of the injury.

7. The claim for benefits was timely filed.

8. The Notice of Controversion was timely filed.

9. The informal conference was conducted on 8/15/ 2002.

10. The Claimant's average weekly wage at the time of injury was $614.29

11. Claimant has been disabled as follows: Permanent Partial Disability from 3/29/02 to the present and continuing.

The parties have also stipulated to periods of coverage by differing carriers and BIW itself. These are: Liberty Mutual began coverage on March 1, 1981 and continued through August 31,1986. Birmingham Fire provided coverage from September 1, 1986 through August 31, 1988, and from September 1, 1988 forward, BIW has been self-insured. Tr. at p. 11.

The only issues in contention are the percentage of permanent partial disability, responsible carrier and Section 8(f) relief.

SUMMARY OF THE EVIDENCE

Claimant's Testimony

Wayne Canwell was born on November 24, 1945. He began to work at BIW on September 25, 1981. Before that, he had a number of different jobs, including work at U-Haul in Florida, and work as a sandblaster, for which he wore muff-type hearing protection. At this job, Claimant testified that the whistling of the sandblasting was so loud and continuous that he could hear it through the protection. Exh. CX- 6 at p. 5. He later worked as a laborer and cleaner in Florida with Cargo. He moved to Maine around 1974, was employed as a delivery truck driver, and was exposed to road noise. From 1977 to 1979, he worked at Pine Street Recovery repossessing cars. From 1980 to 1981, he worked at Lippman Poultry running a grain dryer, which he said was quiet.

At BIW, Claimant worked as a first class sandblaster. He wore foam ear plug hearing protection, as required. He performed that job until November 14, 1983, when he became a laborer, and then a brush painter, and finally did insulating work. *Id.* at p. 8, 14. As a laborer, he worked with a needle gun doing grinding work. *Id.* at p. 9. This work had noise involved, for which he wore hearing protection in the form of foam plugs. He continued the grinding work as a painter. He testified that he could hear the noise through the hearing protection, "it was that loud". *Id*. at p. 12. He also testified that he removed his hearing protection sometimes, such as when walking through the buildings, where he was exposed to noise from chipping, or grinding, needle gunning, and sirens from cranes. *Id.* at p. 13. He stated that the noise was greater in the last ten years of his tenure than the first due to chipping and banging on steel. *Id.* at p. 15.

He left BIW in 1995 by "walking off the job" because he didn't like the place. *Id*. at p. 10. He then did odd jobs, cleaning, primarily. These did not involve exposure to loud noise. *Id*. He heard that there might be compensation available for hearing problems and had a hearing test performed in Lewiston, which he then presented to counsel, who proceeded with the instant claim.

Medical Evidence

Dr. Peter J. Haughwout (Exh. CX- 7b)

Dr. Haughwout examined the Claimant at the request of his attorney on July 9, 2002. He examined Claimant, performed audiograms, and reviewed the results of his audiograms at BIW from 1981 to one at Mid-Coast hospital on March 29, 2002. He found that the Claimant suffered from a progressive sensorineural hearing loss in both ears, but worse on the left. He felt that some of this hearing loss is due to noise exposure at BIW. He calculated Claimant's hearing disability under the AMA formula at 12.8%.

BIW Medical Records

BIW's medical records contain the results of audiograms from 1981. One of these records disclosed that the Claimant had a loss of hearing as of October 13, 1987, as the audiogram at Exh. EX-15 at p. 035 revealed a 190 db loss in the left ear and 95 db loss in the right ear.

POSITIONS OF THE PARTIES

Claimant

Claimant relies upon his testimony that he was engaged in particularly noisy work at BIW, such as sandblasting, painting and grinding, to support his contention that he suffers from a work-related compensable hearing loss. He testified that, throughout his employment, he was exposed to noise from chipping, grinding, needle guns and crane sirens, some of which he could hear through the hearing protection that he wore. He felt that the noises were particularly loud during the last ten years of his employment at BIW.

Claimant also cites to the opinion of Dr. Haughwout, a board-certified otolaryngologist, who concluded that Claimant has a 12.8 % binaural hearing loss and that some of this loss was due to noise exposure at BIW. Claimant argues that the Employer has offered no evidence which disputes these findings.

Claimant seeks benefits for permanent partial hearing loss of 12.8 % based upon the stipulated average weekly wage of $614.29, and related medical expenses. Claimant takes no position on the other contested issues – responsible carrier, and application of Section 8(f) relief.

Employer (Self-Insured)

Employer refers to Claimant's testimony that he used hearing protection for at least ten years at BIW, and was never written up for a violation of the safety rule that requires such use. Exh. CX- 6 at p. 15. Since Claimant testified that he used hearing protection the entire time period he worked at BIW when it was self-insured, it argues for a finding that Claimant was not injuriously exposed to noise from Sept. 1, 1988 forward.

In the event that this argument is found unpersuasive, Employer contends that it should be eligible for Section 8(f) relief, because the Claimant meets the eligibility requirements suggested in *C&P Telephone v. Director, OWCP*, 564 F.2d 503 (D.C. Cir. 1977) and *Equitable Equipment Company Inc. v. Hardy*, 558 F.2d 1192 (5th Cir. 1977) that one have had an existing permanent partial disability at the time of injury, and that the pre-existing permanent partial disability contribute to a subsequent permanent disability following the most recent injury. Here, Employer contends that the pre-existing permanent partial disability is the hearing loss manifest by audiogram on October 13, 1987, which pre-existed BIW's period of self-insurance. Because the pre-existing permanent partial disability, combined with evidence of a subsequent aggravation of the condition, produced a greater disability, Employer argues that Section 8(f) relief is appropriate, citing *Director, OWCP v. Todd Shipyards Corp*., 625 F.2d 317 (9th Cir. 1980). The final prerequisite for obtaining Section 8(f) relief, according to Employer, is that the pre-existing

disability be manifest to the Employer, a requirement that can be met if there are medical records in existence from which the condition was objectively determinable. *Director, OWCP v. Universal Terminal and Stevedoring , Inc*. 575 F.2d 452 (3rd Cir. 1978) This requirement is satisfied here, according to Employer, by existing audiological records in evidence.

Employer continued to employ Claimant despite manifest awareness of his preexisting condition, following a policy preference manifest in *C&P Telephone Co., supra*; *Risch v. General Dynamics Corp*., 22 BRBS 251 (1989) to encourage employers to retain workers who have had pre-existing permanent disability, which occurred during their employment with the employer.

The evidence in this case, Employer argues, demonstrates that the Claimant had a pre-existing permanent partial scheduled award for loss of hearing as of October 13, 1987. Exh. EX-15. The data from the audiogram of this date do not suggest a binaural hearing loss under the 5th edition of the A.M.A. Guides to the Assessment of Permanent Impairment. ("A.M.A. Guides") because the hearing loss in the right ear does not exceed 100 decibels. Table 11-1 of the A.M.A. Guides discloses a 33.8 % monaural impairment, which would entitle Claimant to 33.8 % of 52 weeks of compensation, or an amount for pre-existing hearing loss of 17.58 weeks of compensation. Employer Brief at p. 4. The 12.8 % binaural loss advocated by Claimant entitles him to 12.8 % of 200 weeks of compensation, or a total of 25.6 weeks.

In summary, Employer argues that the Special Fund is responsible for payment of a pre-existing award of 17.58 weeks, discussed above, and the self-insured employer is responsible for the remaining 8.02 weeks of compensation. Employer contends that the combination of these two payments will yield payment to the Claimant for the complete 25.6 weeks of compensation, or all that he is entitled to for hearing loss under Section 8(c) 1-13, which mandates that the Employer/Carrier be responsible for the number of weeks attributable to the new injury, or to 104 weeks, whichever is lesser.

Liberty Mutual

Liberty Mutual, which insured BIW from March 1, 1981 through August 31, 1986, maintains that it is not the responsible party for the hearing loss here because the Claimant's exposure to noise continued after expiration of coverage by Liberty Mutual. It seeks dismissal of the claim as to it.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Percentage of Permanent Partial Disability

The record evidence supports a determination that Claimant suffers a hearing loss impairment of 12.8 % binaural, and that some of this hearing loss is attributed to his exposure to

noise at BIW over the course of his employment, as determined by Claimant's otolaryngologist, Dr. Haughwout. Exh. CX-7b. There is ample evidence that he was exposed to particularly loud noises of grinding, chipping, needle guns and sirens over the years he worked at BIW. Exh. CX-6 at pp. 5, 13, 15. Employer has introduced no evidence to dispute these findings. Although Employer in its self-insured capacity argued on brief that Claimant wore required hearing protection and was never cited for non-compliance, the Claimant testified credibly that he could hear the noise through the hearing protection, observing that "it was that loud". Exh.CX-6. at p. 12. He also testified that he removed his hearing protection sometimes, such as when walking through the buildings, where he was exposed to noise from chipping, or grinding, needle gunning, and sirens from cranes. *Id*. at p. 13. I find that testimony compelling and, in the absence of any countervailing contentions or evidence, I find and conclude that Claimant's exposure to noise over the course of his employment at BIW contributed to his 12.8 % binaural hearing loss.

Responsible Carrier

Under the last employer rule, the employer during the last employment in which a claimant was exposed to injurious stimuli, prior to the date upon which a claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. *Travelers Insurance Co. v. Cardillo*, 225 F. 2d 137, 145 (2d Cir. 1955), *cert. denied sub nom., Ira S. Bushey & Sons, Inc. v. Cardillo*, 350 U.S. 913 (1955). *See Cordero v. Triple A. Machine Shop*, 580 F.2d 1331 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *General Dynamics Corp. v. Benefits Review Board*, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. *Tisdale v. Owens Corning Fiber Glass Co.*, 13 BRBS 167 (1981), *aff'd mem. sub nom., Tisdale v. Director, OWCP, U.S. Department of Labor*, 698 F.2d 1233 (9th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983); *Whitlock v. Lockheed Shipbuilding & Construction Co.*, 12 BRBS 91 (1980).

The evidence supports a determination that the last responsible carrier in this instance was BIW, in its self-insured capacity. Claimant has testified without refutation that he was exposed to loud noises at BIW over the course of his employment, and that the noises were particularly loud during the last ten years because "...they were erecting the units together. There was a lot of chipping going on. There was a lot of banging on steel." Exh. CX-6 at p. 15. The parties have stipulated to periods of coverage, as noted above. Claimant was employed at BIW from September 29, 1981, through May 25, 1999. From September 1, 1988, BIW was self-insured against the risk of liability for impairment awards under the Act. That period covers the last ten years of Claimant's tenure at BIW, where he was exposed to the loudest noises. In the absence of medical or occupational safety evidence to rebut Claimant's contention that he could hear the noises through the ear protection devices that he wore, and removed protection from time to time, which contributed to his injury, his testimony stands as credible and undisputed Accordingly, I find and conclude that BIW, in its self-insured capacity, was the last responsible carrier and is therefore liable for the full amount of the award.

Applicability of Section 8(f) relief

Section 8(f) was intended to encourage the hiring or retention of partially disabled workers by protecting employers from the harsh effects of the aggravation rule. *See C&P Tel. Co. at p.* 503, 512. Without such protection, employers would be justifiably hesitant to employ partially disabled workers for fear that any additional injury or subsequent aggravation of underlying conditions would result in a much greater degree of liability since such workers would suffer from a greater overall disability as a result of the second injury or aggravation than healthy workers would have. *See Director, OWCP v. Campbell Indus.*, 678 F.2d 836, 839 (9th Cir. 1982). *See also* H. Rep. No 92-1441, 92nd Cong., 2d Sess. 8 (1972), *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698, 4705-06; A. Larson, *Workers' Compensation Law* § 59.00 (1992). In furtherance of this goal, the provisions of Section 8(f) are to be liberally construed. *See Todd Shipyard, supra.*

Under Section 8(f) of the Act, an employer may limit its liability for payment of permanent disability if three elements are present:

> (1) The injured worker had an existing permanent partial disability before the most recent injury;
> (2) The injured worker's existing permanent partial disability was manifest to the employer before the most recent injury; and
> (3) Depending on whether the present disability is total or partial,
> (a) if the present permanent disability is total, it is not due solely to the most recent injury; or
> (b) if the present permanent disability is partial, it is materially and substantially greater than that which would have resulted from the most recent injury alone without the contribution of the preexisting permanent partial disability.

33 U.S.C. § 908(f); *Lockheed Shipbuilding v. Director. OWCP*, 25 BRBS 85, 87 (CRT) (9th Cir. 1991).

Therefore, the first question to address is whether Claimant had a preexisting permanent partial disability prior to the subject injury. The disability may be a condition that "...can be an economic disability under Section 8(c)(21) or one of the scheduled losses specified in Section 8(c)(1-20), but it is not limited to those cases alone." See, e.g., *CMP Telephone* and *Equitable Equipment, supra.* The pre-existing permanent partial disability can be a hearing loss. *See, e.g. Fucci v. General Dynamics Corp.*, 232 BRBS 161 (1990). In the instant case, Employer argues that an audiogram from 1987, prior to its assumption of the risk as self-insured, discloses that the Claimant had a pre-existing permanent partial scheduled award for a hearing loss predicated upon a total db hearing loss of 190 db in the left ear and 95 db in the right. Exh. EX-15. This translates into a 33.8 % monaural impairment. Under the scheduled award provisions in the Act, the employee would be entitled to 33.8 % of 52 weeks of compensation, which would result in 17.58 weeks of compensation. Employer continued to employ the Claimant. I find from this evidence that the Employer has satisfied the first part of the three part test for limitation of liability under Section 8(f), namely, that the Claimant had a pre-existing permanent partial disability before

the more recent injury or exposure.

The second part of the test requires that the claimant's permanent partial disability be manifest
to the employer before the most recent injury. The second requirement for Section 8(f) relief will be met if the employer had actual or constructive knowledge of the worker's preexisting disability prior to the subject injury. Constructive knowledge will be established by medical records shown to be in existence at the time of the subject injury from which the preexisting condition was objectively determinable. *Director, OWCP v. Universal Terminal & Stevedoring (De Nichilo)*, 575 F.2d 452, 457, 8 BRBS 498, 504 (3d Cir. 1978). Here, the Claimant's pre-existing condition was manifest in the Employer's audiological records which are in evidence. As noted above, they show that the Claimant suffered a 33.8 % monaural impairment in 1987 by the Employer's own measurements, and Employer continued his employment. Exh. EX-15. Accordingly, the second part of the test has been established.

The third part of the test requires, in the case of a permanent partial disability, that the present permanent partial disability be materially and substantially greater than that which would have resulted from the most recent exposure without the contribution of the pre-existing permanent partial disability. It is clear here that Claimant's hearing deteriorated to the point where he had a 12.8 % binaural hearing loss at the time of his examination by Dr. Haughwout in July of 2002, and that Dr. Haughwout determined his condition to be a progressive sensorineural hearing loss. Ex. CX -7b. Accordingly, it is clear here that the Claimant's pre-existing permanent partial disability noted in 1987 combined with a subsequent aggravation of the condition to produce a greater disability. Pre-existing work exposure and later subsequent additional exposure with an aggravation satisfies this part of the test. *Todd Shipyard, supra*. Therefore, all three parts of the test have been satisfied.

I find that Employer BIW in its self-insured capacity is entitled to special fund relief as follows:

In 1987, Claimant had a 33.8 % monaural permanent hearing loss to his left ear which was manifest to Employer and which entitled him to 17.58 weeks of compensation. (33.8% x 52 weeks under scheduled award provisions of the Act). Claimant continued to be employed despite Employer's manifest awareness of the disability. At the time of the claim, Claimant's hearing had deteriorated to the point where he had a 12.8 % binaural hearing loss, which entitles him to 25.6 weeks of compensation. (12.8 % x 200 weeks under scheduled award provisions of the Act).

Accordingly, I find and determine that the Special Fund is responsible for the payment of the pre-existing 17.58 weeks of compensation, and Employer is responsible for the payment of the balance of 8.02 weeks of the total compensation due Claimant of 25.6 weeks.

Interest on Unpaid Compensation

Although not specifically authorized in the Act, the Benefits Review Board and the Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). Interest is due on all unpaid compensation. *Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78, 84 (1989). The Board has also concluded that inflationary trends in the economy render use of a fixed interest rate inappropriate to further the purpose of making claimant whole, and it has held that interest should be assessed according to the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Attorney's Fees

Having successfully established his right to compensation and medical benefits, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. §702.132, and the Employer will be granted 15 days from the filing of the fee petition to file any objection.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, the following order is entered:

1. The Claimant, Wayne T. Canwell, shall be entitled to a scheduled award of 25.6 weeks of permanent partial disability compensation for a hearing loss based upon 66 2/3 percent of the stipulated average weekly wage of $614.29, pursuant to section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13);

2. Bath Iron Works Corporation, in its self-insured capacity (the "Employer"), shall pay to the Claimant 8.02 weeks of permanent partial disability compensation based upon 66 2/3 percent of the average weekly wage of $614.29, pursuant to section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13);

3. The Special Fund established at 33 U.S.C. §944 shall pay to the Claimant 17.58 weeks of permanent partial disability compensation based upon 66 2/3 percent of the average weekly wage of $614.29, pursuant to section 8(c)(13) of the Act, 33 U.S.C. §908(c)(13);

4. The Employer shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injuries may require pursuant to 33 U.S.C. §907;

5. The Employer shall pay to the Claimant interest on any past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid;

6. The Claimant's attorney shall file, within thirty (30) days of the filing of this Decision and Order in the office of the District Director, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Employer who shall then have fifteen (15) days to file any objection; and

7. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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WILLIAM J. COWAN
Administrative Law Judge

Boston, Massachusetts